# Agenda Item #6

STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners

From: Jonathan Wayne, Executive Director

Date: January 18, 2009

Re: Staff Recommendation on Rule Amendment

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At the September 8, 2009 meeting, the Ethics Commission agreed to accept comments on proposed amendments to Chapter 3, Section 4(4) of the Commission's Rules. This rule sets forth the procedures that the Commission would use if there was insufficient money in the Maine Clean Election (MCE) Fund to pay public campaign funds to candidates. The general procedure established by 21-A M.R.S.A. § 1125(13) (attached) is that the Commission will reduce the public funds payments made to Maine Clean Election Act (MCEA) candidates and will authorize the candidates to make up the difference by raising campaign contributions. Under § 1125(13), a candidate could raise up to $350 per contributor per election for House and Senate candidates, and up to $750 per contributor per election for gubernatorial candidates.

**Comments Received**

The Commission received four sets of written comments (attached) from:

- the 2010 gubernatorial campaigns of Sen. Elizabeth Mitchell and Sen. Peter Mills (submitted jointly),
- the Democratic legislative caucuses,

- the Maine Citizens for Clean Elections, and
- the gubernatorial campaign of Lynne Williams.

At the November 19, 2009 public hearing, the Commission received oral comments from:

- James Mitchell on behalf of Elizabeth Mitchell's campaign,
- Alison Smith, co-chair of the Maine Citizens for Clean Elections,
- David Bright, campaign manager of the Lynn Williams campaign,
- Anya Trundy, on behalf of the Democratic House and Senate caucuses, and
- Daniel I. Billings.

I have attached a memo summarizing the oral comments.

**Staff Recommendation**

After considering the comments received, the Commission staff has re-written parts of the rule amendments that were originally proposed on September 8, 2009. We have incorporated some of the proposals in the comments, but we believe that some are not possible under the current language in § 1125(13). The amendments to the rule now recommended by staff are attached. New language that was not proposed on September 8, 2009 is highlighted in gray.

**Policy Issue 1: How to Apportion Reductions of MCEA Payments (if necessary)**

In paragraph 4(4)(C) of the original September 8 draft, the rule stated that the Commission would reduce the *initial payments* made to all MCEA candidates *for the general election proportionally.*[1]

During the comment phase, the Commission received a consensus view regarding how to reduce public funds payments to candidates in case of a shortfall. The approach was supported by comments from the Democratic caucuses,[2] Senator Peter Mills and Senate President Elizabeth Mitchell, the Maine Citizens for Clean Elections, and attorney Dan Billings. The staff has incorporated this view in the rewritten rule amendments.

- *Legislative candidates.* If the Commission must reduce public funds payments to legislative candidates, the rule calls on the Commission to reduce *the initial payments made to legislative candidates for the general election* (in June of the election year). The benefit of this approach is that the fundraising burden is spread among 300+ program participants, which will reduce the hardship. The Commission would not reduce the matching funds that are available to legislative candidates.

- *Gubernatorial candidates.* If the Commission must reduce public funds payments to gubernatorial candidates, the Commission would reduce *the matching funds payments for the general election.* Typically, the candidates usually receive matching funds in September or October of the election year. The candidates would receive the full initial payment for the general election ($600,000).

The approach is written as a presumption in the rule, so that if the Commission determines later in 2010 that there are policy reasons to reduce public funds differently, the Commission would have the discretion to do that.

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[1] This language was included in the rule for discussion purposes based on oral testimony received by the Commission at a July 2009 public hearing during a prior rule-making.

[2] In the caucuses' written comments dated November 9, 2009, they stated their support for "Option 1A." For your information, this is a reference to reducing initial payments paid to the legislative candidates for the general election in a hypothetical financial scenario that I distributed to caucus staff during the comment phase.

**Policy Issue 2: Whether to Segregate Campaign Contributions**

If the Commission permits MCEA candidates to raise campaign contributions, the question has arisen whether the candidates should be able to deposit the funds in the same bank account as their public campaign funds or must segregate the contributions in a separate account. The staff agrees with the approach suggested by the Maine Citizens for Clean Elections:

- If the candidate is raising funds campaign contributions which the candidate *has been* authorized to spend, the candidate should deposit the contributions in the *same* bank account as the candidate's public campaign funds.

- If the candidate is raising funds which the candidate has not yet been authorized to spend, the candidate should segregate the contributions in a separate account. This will minimize the risk of candidate spending the funds for campaign purposes without authorization by the Commission.

**Policy Issue 3: Disposing of Unspent Campaign Contributions**

The Commission staff recommends that if candidates collect campaign contributions that they *were authorized to spend* and that were commingled with their public campaign funds, any of those contributions that remain unspent after the election should be returned to the Commission.

The staff has wrestled with the question of how an MCEA candidate who raised private contributions should dispose of them after the election if the Commission *did not authorize* the candidate to spend them. In the originally proposed September 8 rule amendments, the MCEA candidates would have had the same flexibility to dispose of unspent contributions as traditionally financed candidates under 21-A M.R.S.A. §

1017(8). They would have had four years to dispose of the funds. These methods are listed in the attached guidance flier for traditional candidates.

The only comments on this policy issue were made by the Maine Citizens for Clean Elections. The Commission staff's thinking has been influenced by their comments, although we have not adopted all of their suggestions. The Clean Election advocates believe that permitting most of the types of payments in 21-A M.R.S.A. § 1017(8) (making a gift to the candidate's party, another candidate, or a charity; carrying the funds forward to a future election campaign; paying for legislative expenses) are inconsistent with the intent of the Maine Clean Election Act. One goal of the program, they argue, is to diminish the role of money in political campaigns. Under the design of the MCEA, the financial side of being a publicly funded candidate *ends* when the candidate files his or her final campaign finance report 42 days after an election. An MCEA candidate will not have a bundle of leftover cash to use for political or office-related purposes for months or years after the election. The Clean Election advocates urge the Commission to depart from this scheme as little as possible.

In the rewritten rule, the Commission staff proposes that MCEA candidates with unspent campaign contributions which they were not authorized to spend would have six months to dispose of them. We would suggest the following methods as alternatives:

- returning the unspent campaign funds to the contributors,
- donating them to the Maine Clean Election Fund,
- making an unrestricted gift to the State,

- paying for transition or inaugural expenses, or any expense incurred in the proper performance of the office to which the candidate is elected, or
- by making a gift to a charitable or educational organization

To the Commission staff, these seem like reasonable alternatives that are not contrary to the spirit of the MCEA.

**Policy Issue #4: Permitting Campaigns to Raise Additional Contributions to Cover Campaign Costs**

The Commission received some written comments from Sen. Mitchell and Sen. Mills suggesting that if the gubernatorial candidates are required to raise a large amount of campaign contributions to replace reductions in public campaign funds, that the candidates should also be permitted to raise an *additional* sum to cover their fundraising costs. James Mitchell spoke in support of the proposal at the November 19th meeting, and David Bright of the Williams campaign voiced approval for this suggestion.

As an example, presume that a gubernatorial candidate qualified to receive full matching funds for the general election. That candidate would be entitled to receive total public funding of $1,200,000 for the general election. If, due to a shortfall, the Commission could afford to pay only $900,000 in public funds to the candidate, under the Mitchell/Mills proposal the Commission might authorize the candidate to raise an additional $350,000 (including $300,000 to pay for general campaign expenses and $50,000 to cover unanticipated fundraising costs).

The Commission staff is not opposed to the suggestion. However, because of the following underlined language in 21-A M.R.S.A. § 1125(13), we believe the Commission cannot authorize the candidate to *spend* more than the maximum of public funds that they would receive for the general election ($1.2 million in 2010):

> Notwithstanding any other provisions of this chapter, if the commission determines that the revenues in the fund are insufficient to meet distributions under subsections 8 or 9, the commission may permit certified candidates to accept and spend contributions, reduced by any seed money contributions, aggregating no more than $500 per donor per election for gubernatorial candidates and $250 per donor per election for State Senate and State House candidates, up to the applicable amounts set forth in subsections 8 and 9 according to rules adopted by the commission. [the amounts of public campaign funds paid to candidates as initial payments and matching funds]

We therefore believe that the fundraising allowance proposed by the Mitchell and Mills campaigns would need to be accomplished through legislation. In speaking to some legislative staff, my understanding is that some legislators are considering introducing a bill concerning how candidates would raise campaign contributions if there were a shortfall in the MCE Fund. The concept of an additional fundraising allowance could be included in the bill.

**Policy Issue 5: Banning Contributions from Sources Other than Individuals**

In written comments submitted by the Senate and House Majority Leaders, the Democratic caucuses suggest that if the Commission authorizes candidates to raise contributions of up to $350 or $750, the Commission should allow candidates to raise the contributions *only from individuals*, and not other sources (*e.g.*, PACs, political parties, corporations.). The caucuses suggest that this approach is more consistent with the overall approach of limiting the impact of interest groups on the political process. While

§ 1125(13) does permit the Commission to adopt rules regarding the acceptance of campaign contributions in the case of a shortfall, the staff is unsure that the Commission could unilaterally restrict the sources of contributions collected by MCEA candidates to individual donors. We suggest that this policy should be advanced in the legislation being contemplated, rather than by Commission rule.

Thank you for your consideration of this memo.

Amendments recommended for adoption on 1/28/10 (changes from original 9/8/09 proposal are highlighted in gray)

**Chapter 3, Section 4(4). ~~Distributions Not to Exceed Amount in Fund~~ Authorizing Contributions due to Shortfall in the Fund.**

A. **Authorization by Commission to accept contributions.** If the Commission determines that the revenues in the Fund ~~are~~ may be insufficient to ~~meet distributions~~ make payments under ~~this chapter~~ section 1125 of the Act, the Commission ~~will~~ may reduce payments of public campaign funds to certified candidates and permit ~~certified candidates~~ them to accept and spend contributions in accordance with the Act [§1125(13)].

B. **Limitations on permitted contributions.** If permitted to accept contributions, a certified candidate may not accept a contribution in cash or in-kind from any contributor, including the candidate and the candidate's spouse or domestic partner, that exceeds $750 per election for gubernatorial candidates and $350 per election for State Senate and State House candidates. A candidate may not solicit or receive any funds in the form of a loan with a promise or expectation that the funds will be repaid to the contributor. If a contributor made a seed money contribution to a candidate, the amount of the seed money contribution shall count toward the contribution limit for the primary election. For a replacement candidate or candidate in a special election, a seed money contribution shall count toward the contribution limit for the election in which the candidate is running.

C. **Apportioning reductions in public funds payments.** Upon determining the amount of the projected shortfall, the Commission shall then determine the amount and apportionment of the reductions in payments to certified candidates. The Commission shall reduce the initial payments to legislative candidates for the general election and the matching funds available for gubernatorial candidates in the general election, unless the Commission determines that there are policy reasons to apportion the reductions differently.

D. **Campaign contributions to replace matching funds.** If the Commission reduces the amount of matching funds to be paid to certified candidates, it may permit candidates to raise contributions to replace matching funds in advance of the authorization to spend matching funds. Any amount of contributions raised that exceeds the amount of campaign funds the candidate has been authorized to spend must be deposited into a separate account with a bank or other financial institution. The candidate may spend the contributions as matching funds only if authorized by the Commission staff. The unauthorized expenditure of contributions raised to replace matching funds is a substantial violation of the Act and this rule.

E. **Written notice to candidates.** The Commission shall ~~will~~ notify participating and certified candidates in writing of any projected shortfall in the Fund and ~~will~~ specify timelines and procedures for compliance with this ~~chapter~~ subsection in the event of ~~any such~~ a shortfall.

F. **Procedures for candidates.** The candidate shall deposit any authorized contributions into the campaign account into which Maine Clean Election Act funds have been deposited, except funds which must be deposited in a separate account under paragraph D. The candidate shall disclose all contributions received in regular campaign finance reports. The Commission's expenditure guidelines for Maine Clean Election Act funds apply to the spending of the contributions authorized under this subsection.

G. **Disposing of surplus campaign funds.** After the election, the candidate must return any surplus campaign funds which the candidate was authorized to spend to the Commission upon the filing of the 42-day post-election report except for any money retained for purposes of an audit by the Commission pursuant to section 7, subsection 2(B). If the candidate has collected campaign contributions which the candidate was not authorized to spend, the candidate may dispose of those funds within six months after the election by returning them to the contributors, donating them to the Maine Clean Election Fund, making an unrestricted gift to the State, paying for transition or inaugural expenses or any expense incurred in the proper performance of the office to which the candidate is elected, or by making a gift to a charitable or educational organization. All expenditures of surplus campaign funds must be disclosed in campaign finance reports in accordance with 21-A M.R.S.A. § 1017.

H. **Effect of fundraising on matching funds calculation.** If the Commission authorizes a certified candidate to accept campaign contributions pursuant to section 1125(13) of the Act and this subsection, the amount of the contributions that the candidate has been authorized to spend shall be treated as fund revenues received by the candidate for the purpose of calculating matching funds. Any reduction in the amount of public campaign funds paid to a certified candidate under sections 1125(8) or (10) of the Act will not affect the fundraising or spending threshold that triggers accelerated reporting by an opponent of the certified candidate under 21-A M.R.S.A. § 1017(3-B).

## Procedure in Maine Clean Election Act Addressing Insufficient Money in Maine Clean Election Fund (21-A M.R.S.A. § 1125(13))

**13. Distributions not to exceed amount in fund.** The Commission may not distribute revenues to certified candidates in excess of the total amount of money deposited in the fund as set forth in section 1124. Notwithstanding any other provisions of this chapter, if the commission determines that the revenues in the fund are insufficient to meet distributions under subsections 8 or 9, the commission may permit certified candidates to accept and spend contributions, reduced by any seed money contributions, aggregating no more than $750 per donor per election for gubernatorial candidates and $350 per donor per election for State Senate and State House candidates, up to the applicable amounts set forth in subsections 8 and 9 according to rules adopted by the commission.

Date: November 9, 2009
To: Maine Ethics Commission
From: Maine Senate Democrats / Maine House Democrats
RE: MCEA: Legislative Proposal

Thank you for the opportunity to comment on the proposed reductions to Maine Clean Elections Act funds, the proposed changes the MCEA program in 2010, and the impact of those changes on MCEA – certified Legislative candidates.

We are happy to say that we support option 1-A as proposed by the Commission's Staff as it pertains to Legislative candidates. While initial disbursement funds are an essential part of the MCEA and the proposed cuts will be difficult for legislative candidates, we believe they are the best option. Option 1-A spreads $321,300 worth of cuts across 323 candidates for House and Senate. This option will result in cuts to initial disbursements of $700 for candidates for the House and $2100 for candidates for the Senate. MCEA certified candidates would then be able to raise this reduction from private sources.

We support option 1-A as proposed because options 2-A and 2-B, while perhaps attractive as they avoid cuts to the initial disbursements for legislative candidates, would require them to raise prohibitive amounts of money. For example, option 2-A would require a candidate for the senate to raise $4,472, nearly twice the amount under 1-A. Option 2-B is no better, as some candidates would be required to raise upwards of $24,000 in private funds, or roughly twelve times the amount proposed in 1-A.

While we do support option 1-A as proposed however, we do have several proposals we would like to make:

- That candidates be allowed to raise private contributions in the same amounts as a privately financed candidate, or up to $350 per election. These funds would be put into the same account as their MCEA initial disbursements and would be spent as if they were part of that same disbursement.

- It is imperative that MCEA candidates be allowed to raise money in the same amounts as their private counterparts. Raising private funds will already be a substantial task for MCEA candidates who were initially promised the opportunity to run for office without needing to raise any private funds. Requiring them to raise these funds only in amounts of $100 or less would place an undue burden on these candidates and mad a tough situation even worse.

- That candidates only be allowed to raise these private funds from individuals, not from corporations, political action committees, or lobbyists. The MCEA was created with the goal of reducing the influence of corporations' and interest groups' money in the political process. Allowing MCEA candidates to raise private money from the sources for the election campaigns would be a mockery of the system.

We feel that these proposals would strengthen option 1-A as it is currently proposed and create a workable solution for MCEA candidates running in the 2010 elections. While the current situation is not ideal, we feel with the these proposed changes option 1-A can offer the strongest possible system for legislative candidates who want to use the MCEA.

Thank you for your consideration.

Sen. Phillip Bartlett,

Senate Majority Leader

Rep. John Piotti,

House Majority Leader

Date: November 9, 2009
To: Maine Ethics Commission
From: Mitchell for Governor/Mills for Governor
RE: MCEA: Gubernatorial Proposal

Thank you for the invitation to comment on proposed reductions to the Maine Clean Elections Act funding and the impact the suggested options will have on the Clean Elections candidates for Governor.

The initial distribution of funds upon candidate qualification and upon winning the primary is a critical factor in the decision for a candidate to risk the rigors of public financing. Because the MCEA funds are limited, Clean Elections candidates must carefully plan strategically to spend these funds to stay competitive with a privately financed candidate. Because the public funding option allows a campaign to spend its limited resources on voter contact rather than raising funds, losing part of the initial disbursement would significantly handicap a MCEA-financed gubernatorial candidate. To change the playing field mid-game will discourage future candidates from choosing to run public campaigns for statewide office. The cost and challenge of a statewide campaign already makes the choice very difficult and we have yet to know whether or not one can succeed against better-financed opponents.

We understand the need for MCEA to remain within its budgeted resources. We also believe it a safe assumption that the gubernatorial campaigns will trigger matching funds in the 2010 election. If funding must be reduced, reductions should come from matching funds, giving the candidate time to raise enough money to replace that loss revenue. Cutting from matching funds, if needed, does allow the MCEA to remain within its budgeted resources. For that reason we do support Option 1A ($142,000 cut to the gubernatorial campaigns) with three very important caveats.

1) That the funds be taken from matching funds, rather than the initial disbursement. Given the high probability of matching funds being used in the fall 2010 election for the Gubernatorial races, this does mean the MCEA will meet its budget targets.

2) That the campaigns raise funds required at the level of a traditionally funded candidate ($750 maximum) and that those funds be put into a segregated account by the candidate – not given to MCEA. The candidate will only be allowed to spend from that account with approval of the Ethics Commission, based on the trigger of matching funds.

3) An additional $50,000 (for a total of $192,000) of fundraising should be authorized in order to cover the expense of funding otherwise-unnecessary fundraising.

The decision to run using the clean elections system versus using traditional funding is not an easy one. Both types of campaigns require tremendous amounts of work, either raising traditional donations or raising seed money and qualifying contributions.

The Clean Elections candidate does require a very different strategy for the actual campaign. All of the fundraising work collecting the seed money and the qualifying contributions is up front – in the first six months of the campaign. Once the seed money and qualifying contributions are met, the candidate and the campaign focus on the grassroots work of contacting voters and getting the campaign's message out. It requires extraordinary discipline with limited funds. In a traditionally

funded campaign, there is always an opportunity to raise more money for a last minute mailing, an upgrade of the website, or any of the other myriad of expenses of a campaign. Clean Elections candidates have a very strict budget, and once that budget is spent, no additional money can be raised. That requires a campaign plan that shifts resources from fund raising to grassroots as soon as the seed money and qualifying contributions are completed.

Essentially, this cut in matching funds is a game changer for the Clean Elections candidate. Raising the additional funds of $142,000 will require the equivalent effort of raising the seed money, even though it is in larger amounts. When deciding to run as a MCEA funded candidate, this new obligation was not part of the consideration. Campaigns have not allocated their limited resources towards additional fund raising, and it cannot be under estimated the amount of resources it will take to raise these funds. Clean Elections campaigns are very lean, and there simply are no budgeted resources to raise those additional funds.

Because this shortfall in MCEA funding will require MCEA candidates to significantly change their campaign strategy in order to raise the now missing matching funds, the campaigns will incur significant expenses. Fundraising appeals, events, and considerable time and effort will be required, and unlike a traditional candidate, this effort is not part of the MCEA funded campaign's budget. In order to pay for and accomplish this task, it will be necessary to raise funds beyond what the shortfall is predicted to be in matching funds.

For this reason, we are asking that campaigns be allowed to raise an additional $50,000 into the segregated matching fund account to cover these new unanticipated costs. It is important to note that while the campaign will incur the expense of fundraising, those funds will not be available to the campaign unless matching funds are triggered. We are not asking to add $50,000 in fund raising to the initial disbursement after the primary even though the campaign will have to expend that amount to raise the matching funds. The campaign will only be authorized to spend those additional funds once matching funds are triggered.

We understand the need to meet the shortfall in MCEA funds. We are simply asking to keep the playing field level. The Clean Elections system will only retain its appeal for gubernatorial candidates if there is a strategic advantage to candidates. Handicapping MCEA candidates by taking the shortfall from the initial distribution, and not recognizing the very real costs of the campaign having to raise its own matching funds will make it extremely unlikely that future candidates for governor will elect to use the system in the future.

Thank you for your consideration.

Sincerely,

Elizabeth Mitchell,

Candidate for Governor

Peter Mills,

Candidate for Governor

To: Maine Commission on Governmental Ethics and Election Practices

From: Maine Citizens for Clean Elections

Date: December 4, 2009

Re: Rulemaking

MCCE appreciates the opportunity to submit written testimony regarding rules dealing with the limited private fundraising that would be allowed within the Clean Election system should the system lack sufficient funds in 2010. It is important to have a good rule in place to deal with the possibility of a shortfall, but it is our fervent hope that available funding will be adequate for all qualified candidates.

**Apportioning reductions across all candidates (paragraph C)**

According to testimony received by the Commission, the legislative caucuses prefer across-the-board cuts to initial distributions while several gubernatorial candidates prefer cuts to potential matching funds. While we believe the logistics are simplest in making small, across-the-board cuts to initial distributions, there is sound rationale for doing the opposite in the gubernatorial race, where it is very likely that maximum matching funds will be authorized.

We believe the rule allows the Commission to accommodate the different wishes of legislative and gubernatorial candidates that have been expressed during the rulemaking process but suggest that paragraph C be reworked to more accurately reflect the fact that different races may be treated differently. Specifically, the language should allow for distributions as described in Option 1A in Jonathan Wayne's memo dated November 3, 2001, which most of the interested parties seem to prefer.

**Raising contributions to replace matching funds (paragraphs D and F)**

Candidates who raise funds in advance of the authorization to spend matching funds should be required to hold these funds in a segregated fund as the draft rule requires. That makes sense since there has been no authorization to spend the funds, and there may never be authorization to spend them.

If the authorization has already been granted, we are not certain that rationale exists to raise those funds into a separate account. If the Commission believes that there is no practical benefit in requiring a consistent procedure and no harm in allowing candidates to raise contributions to replace authorized matching funds directly into the main campaign account, then the rule should be revised to require only that unauthorized funds be deposited into a segregated account. Otherwise candidates might inadvertently find themselves in violation of this rule, even though they had not done anything objectionable.

MCCE recommends that the rule state that these replacement funds are the final matching funds to be spent. In other words, these funds would be held in a segregated account until they are needed, when the Commission is unable to pay out any more from the Maine Clean Election Fund.

We agree with the elimination of the sentence in paragraph D that Jonathan Wayne suggests in his memo of November 10, 2009. We think the sentence which follows that one could also be dropped for the same reasons. That sentence reads, "The Commission shall, as much as possible, reserve revenues in the Fund to pay matching funds to candidates."

**Disposal of unspent funds (paragraph F)**

We recommend that any replacement contributions that are authorized to be spent and are commingled with public funds be treated in every way as public funds. Accordingly, we believe that any funds that remain in the candidate's main campaign account should be returned to the Maine Clean Election Fund as the statute currently demands.

Unauthorized funds that remain in a segregated account are another matter. To be consistent with the principles of the Clean Election system, we believe that candidates should have very limited options in disposing of these funds. It would not be appropriate for a Clean Election candidate to carry over funds to a subsequent campaign; make a gift to another candidate, political party or charity; or pay for expenses related to legislative service. Therefore we don't think the rule should refer to the existing statute that deals with privately funded candidates' surplus campaign funds.

We recommend that the rule state that candidates may either return these unspent contributions to the original donors or turn them over to the Maine Clean Election Fund or the state treasury.

**Other issues**

We wish to address several additional issues that were raised in written and oral testimony.

First, Democratic leadership proposes to apply new restrictions to these privately raised contributions, specifically to ban contributions from political action committees (PACs), corporations and lobbyists. In her oral testimony, Anya Trundy, representing the Democratic caucuses, confirmed that the proposal was not meant to ban lobbyists as individuals from making such a donation, only that lobbyists would not be allowed to use client or corporate funds to do so.

We agree that applying source limits to these to privately raised contributions is a good idea and would be consistent with the Clean Election program. All other private funds in the system come only from individuals, not PACs or corporations. We are uncertain whether such a change could be made in the rule; it might be made more appropriately to the statute.

Second, several gubernatorial candidates have proposed allowing them to raise additional contributions above and beyond the statutory cap in order to cover fundraising expenses. Their rationale is that no Clean Election candidate budgets for fundraising expenses once public funds are available. We do not believe that the statute allows private contributions to be raised beyond the limits set forth in statute.

Clean Election candidates enjoy an advantage because they do not need to put resources into raising money once they are qualified. Any shortfall that triggered private fundraising would be unfortunate, but it would not put the CE candidate at a disadvantage relative to privately funded candidates; more accurately, it would eliminate an advantage.

At the hearing, Mr. Mitchell expressed his concern that distribution amounts in the gubernatorial race might be too low for viability. The current legislature has already agreed on distributions for 2010, and candidates have made their funding decisions based on the current amounts, so we do not recommend changing them now. We agree that it is important that distribution amounts be sufficient for candidates to run vigorous, competitive races. The system will not continue to be successful if candidates are under-funded and lack adequate resources to communicate with voters. This is not a matter to be taken up in rulemaking, but it should be part of the Commission's review following the 2010 elections.

Thank you for the chance to weigh in on the draft rule, and please don't hesitate to contact us if we can provide any other information.

To: Maine Commission on Governmental Ethics and Election Practices
From: David Bright, a registered voter in Dixmont, Maine
Date: Dec. 4, 2009
Re: Proposed actions in dealing with a projected shortfall in Clean Election funding

This is a follow up to my comments at the public hearing on Nov. 19, 2009 regarding possible changes to the rules and/or statutes if it is determined that the Legislature will not be able to meet its obligations to Clean Election candidates.

First of all, I will repeat my statement made at the public hearing that I believe the Commission has an obligation to deal aggressively with the legislature and the administration so as to make every possible effort to see that the Maine Clean Elections program is adequately funded. The Commission is the trustee on behalf of the 320,755 Maine voters who voted on Nov. 5, 1996 to create the Maine Clean Election system, as well as the many Maine citizens since then who have supported this program through their contributions to the fund.

Budget crisis or not, taking money from this fund was an irresponsible act on the part of the legislature and the administration. Not returning the money borrowed shows a lack of respect for both the people of Maine and the candidates who support this law.

Not meeting additional funding obligations will also be unfortunate. The Maine Clean Election Act is about elections, and elections are the foundation of everything we do in government. If the elections are suspect, then everything that goes on in state government may be suspect as well. There are things that should be cut from the budget during fiscal hard times, and there are things that should remain protected. Money to make the election process fairer and more transparent is one of those things that should not be cut. The Commission must do whatever it can to protect the integrity of this law.

That having been said, I have little confidence that the Commission will be successful in seeing the program fully funded this year. I sense from the behavior of the Legislature over this past year that it has little respect for the program, nor does the current crop of legislators – many of whom use the program – seem to understand the history or public sentiment that created it.

So it seems obvious that the Commission may well find itself in a situation where it cannot meet its statutory obligations to fully fund all the gubernatorial campaigns that will be entitled to funding in 2010, and thus will be forced to allow clean election candidates to raise additional private money to finance their campaigns. As I understand it, the Commission is hopeful it will be able to pay all campaigns that qualify the initial $200,000 for a primary and $600,000 for a general election, but fears it will not be able to make the complete $600,000 in matching funds for the fall election.

As such, I propose the following:

- That the Commission immediately allow DOI gubernatorial campaigns to establish a secondary bank account so campaigns may segregate privately raised matching funds from seed money and Clean Election funds.

- That the Commission permit DOI candidates to immediately start raising private funds into these segregated accounts, with the condition that the money placed in those accounts not be expended except with permission of the Commission, in such amounts and at such times as the Commission permits.

- That interest earned by these accounts accrue to these accounts.

- That DOI candidates be allowed to solicit contributions to these accounts under the same rules as allowed privately funded candidates – both in terms of amounts raised and sources of the contribution. Thus if a privately funded candidate is allowed to collect up to $750 from an individual, a DOI or Clean Election candidate would be allowed to collect up to $750 from an individual for this account. And if a privately funded candidate is allowed to accept a contribution from a non-individual (i.e. a PAC, political committee or other allowed funding source), a DOI or Clean Election candidate be allowed to accept contributions from these same classes of contributors.

- That between the time the Commission allows DOI candidates to begin collecting matching-fund contributions and the time that the DOI candidate files a Clean Election application, the campaigns may make their own determination as to whether any portion of the contribution from an individual – up to a limit of $100 – be considered seed money and placed in the campaign's primary account.

- That if there remains any funds in the special account at the conclusion of the campaign, that the remaining money be allowed to be disbursed under the same rules as apply to privately funded campaigns.

All of these suggestions are designed to – in the favorite expression of our governor – "level the playing field" for those Clean Election candidates who may become victims of the Legislature's refusal to meet its statutory obligation to properly fund their campaigns.

Under my proposal, all candidates will be operating under the same rules as it pertains to the amount of funding that Clean Election candidates are forced to raise privately.

Finally, I support the comments filed by Senators. Mills and Mitchell that in making its determination of how much private money a Clean Election candidate will be allowed to raise the Commission recognize the reality that it takes money to raise money. In round numbers, Senators Mills and Mitchell estimated it takes about $50,000 to raise $150,000, giving a ratio of about 33 percent. I believe this is a reasonable figure, and would urge the Commission to take this calculation into account when determining how much private funds a Clean Election candidate may raise.

STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members

From: Paul Lavin, Assistant Director
Cyndi Phillips, Commission Assistant

Date: November 25, 2009

Re: Comments Received at the Public Hearing on the Commission's Proposed Rule Regarding Insufficient MCEA Funds

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**James Mitchell**

James Mitchell, speaking on behalf of the Libby Mitchell for Governor campaign, raised his concerns regarding the proposed report to the Legislature on the status of the Maine Clean Election Fund for the 2010 election cycle. Mr. Mitchell questioned the staff's assumptions regarding the worst-case scenario. For the report, the staff estimated five primary candidates and three general election candidates, which resulted in a significant shortfall. However, he said currently there are six primary candidates and potentially five general election candidates. He expressed concern that the draft report underestimates the potential shortfall. He said that while it is possible that not every gubernatorial candidate seeking MCEA certification will qualify, the Commission should base its report on the possibility that all will qualify, in which case there may be no funds available for the general election.

Mr. Mitchell said that the amount of money ($1,200,000) provided to MCEA gubernatorial candidates is not realistic given the cost of recent large campaigns in Maine, *e.g.*, former Representative Tom Allen's 2008 Senate campaign ($5,700,000), Gov. Baldacci's 2006 re-election campaign ($1,500,000), and Representative Chellie Pingree's 2008 campaign ($2,000,000 in the general election and $1,000,000 in the primary). He was concerned by the prospect that the MCEA funds available to gubernatorial candidates, which is not sufficient in the first place, may be reduced even more.

Mr. Mitchell said the Mills and Mitchell campaigns proposed that in addition to raising private funds up to the amount of any funding reduction, the campaigns should also be allowed to raise an additional $50,000 above the statutory distribution amount to cover the cost of the private fundraising effort. He said that it is clear that the gubernatorial campaigns are under-funded; however, that is part of the fundamental agreement to become a clean election candidate. Candidates have less money to run their campaigns but in exchange, they have more time for campaigning instead of fundraising. Mr. Mitchell said that when the State reneges on its part of the agreement, candidates must then spend much more time fundraising instead of campaigning. He said that is not equitable or fair, because the purpose of the MCEA is to level the playing field and allow candidates to spend more time campaigning. He said fundraising requires candidates to spend substantial amounts of time calling contributors instead of talking to people and campaigning for votes. He said in order to truly level the playing field, candidates should be able to raise twice the amount of the reduction, plus an additional one-third of that amount to cover the costs of fundraising.

He said he agreed with the suggestion that in order for candidates to spend more than $1,200,000, the statute must be changed. He recommended that if the Commission proposes any statutory changes to the amount that a MCEA candidate can raise or spend, it do so as soon as possible in order to avoid the potential of a legal challenge later on in the election cycle.

**Alison Smith**

Alison Smith, co-chair of Maine Citizens for Clean Elections (MCCE), said the MCCE agreed with the staff's recommendation to remove the sentence regarding the avoidance of fundraising in the last six weeks of the election. Ms. Smith said that the MCCE also believed that there was a sound rationale for the policy of treating legislative and gubernatorial candidates differently by making small across the board cuts in the initial distributions to legislative candidates and reducing the amount of matching funds that would be available to gubernatorial candidates.

Ms. Smith said that while the law does not clearly state that candidates may raise funds they are not authorized to spend, the MCCE supports this policy so that candidates are not forced to fundraise at the end of their campaign. She also said the privately raised matching funds should be used after public funds have been exhausted. Ms. Smith questioned whether it was necessary for the rule to require that all privately raised funds be deposited into a separate account. She said that it seemed that only the unauthorized funds needed to be deposited into a separate account. The amounts that a candidate raised after receiving authorization could be deposited directly into the primary campaign account.

Ms. Smith said the MCCE does not agree with the draft rule regarding how candidates should dispose of surplus privately raised funds. She said once the authorized private funds are commingled with public funds, they should be treated in every way as public funds and should be returned to the Maine Clean Election Fund (MCEF). In a previous hearing on proposed rules, the Commission decided that the expenditures guidelines would apply to all purchases made with commingled funds. She said the same logic should apply to surplus campaign funds once authorized private and public funds have been commingled. Any surplus in the campaign account should be returned to the MCEF. However, the unauthorized funds in the segregated accounts should be returned to the donors, the MCEF, or the State treasury. She said the other options under the statute available to traditionally funded candidates, *e.g.*, to make gifts to their party, another candidate or a charity, to carry surplus funds over to future campaigns, or to pay for legislative expenses, are inconsistent with the intent of the Maine Clean Election Act. Ms. Smith urged the Commission to limit the options for disposing of unauthorized, privately raised matching funds.

Ms. Smith said MCCE agrees with the policy, suggested by the Democratic legislative caucuses in their written comments to the Commission, to prohibit contributions from PACs, lobbyists or corporations and to allow only contributions from individuals. However, the MCCE questions whether these restrictions could be implemented through rulemaking or whether it would require a statutory change. She said the MCCE also questioned whether banning a lobbyist from making a contribution as an individual might

be subject to a constitutional challenge and encouraged the Commission to get a legal opinion before implementing a rule or proposing a statutory change.

Ms. Smith said that it would require a statutory change to allow a candidate to raise and spend more that the amounts established in the Maine Clean Election Act in order to pay for the additional fundraising expenses.

Ms. Smith said that one of the advantages of being a MCEA candidate is that the candidate can focus on campaigning rather than fundraising. She said that while it would be unfortunate if MCEA candidates had to raise private contributions due to a shortfall, it would not really put them at a disadvantage relative to privately financed candidates. In order to maintain parity with a MCEA candidate who receives $1,200,000, it is necessary for a privately financed gubernatorial candidate to raise $1,500,000 because they have to spend money to raise money. She said that the MCCE shares the concern expressed by others about under-funding these campaigns.

**David Bright**

David Bright, campaign manager for the Lynne Williams for Governor campaign, said he agreed with the comments made by Mr. Mitchell that MCEA candidates will have to spend money to raise the additional private funds to cover any shortfall. He also said that he believed it was inconsistent with the purpose and spirit of the Maine Clean Election Act to require gubernatorial candidates to raise $40,000 and for the Legislature to transfer money out of the Maine Clean Election Funds. He said the Commission should be aggressive in trying to get the Legislature to return those funds. Mr. Bright said that the Maine Clean Election Act was intended, in part, to foster better government. He said the integrity of the electoral process is fundamental to everything the Legislature does and if the people cannot trust the integrity of the electoral process, then everything the Legislature does is suspect. Mr. Bright expressed doubt that the anticipated funds transfers for the 2010 election cycle will actually occur given the size of the existing state budget gap. In light of that, the Commission should authorized campaign to start raising funds now.

Mr. Bright said that he agreed with the proposed rule that candidates maintain a separate account for privately raised funds. He said that maintaining separate accounts and transferring funds between accounts is easily done and that campaigns will be able to keep accurate and transparent records of the private funds raised.

**Anya Trundy**

Anya Trundy, House Democratic Caucus Director, said that she was speaking on behalf of both the House and Senate Democratic caucuses and their respective leaders. She said that their initial reaction was that the reduction should be taken from the matching funds but after seeing the staff's calculations, they determined that it would be better to reduce the initial distribution instead (Option 1A). This option is preferable because candidates will know at the outset how much they have to raise and the amounts to be raised are reasonably achievable. Ms. Trundy said that the option to reduce the initial distribution by an equal percentage across all candidates (Option 1B) would impose a greater hardship on Senate candidates who would have to raise $1,000 more than under Option 1A. She said that many candidates have run as MCEA candidates in the past and do not have the kind of fundraising network this effort would require.

Ms. Trundy made the following suggestions for the Commission's consideration:

- Candidates should be allowed to accept contributions from individuals only, including individual lobbyists, but not from corporations, PACs and lobbying firms.
- The private contribution limits ($350 for legislative candidates and $750 for gubernatorial candidates) should apply instead of the $100 seed money contribution limit.

Mr. Youngblood asked Ms. Trundy for her perspective on the ability of legislative candidates to keeps accurate records. He said the gubernatorial candidates have more expertise regarding keeping records; whereas, the legislative candidates have had difficulty in the past. He expressed concern over the legislative candidates' ability to keep track of the requirement to separate funds.

Ms. Trundy responded that gubernatorial candidates would have a somewhat more complicated task since they would have to raise funds to cover a reduction in matching funds, which would have to be kept in a separate account until they were authorized to use those matching funds. Legislative candidates' initial distribution would be reduced. Any private funds raised would not have to be segregated from public funds and could be deposited directly into the campaign account. She said the recordkeeping process would be the same as that for seed money contributions.

**Daniel I. Billings**

Daniel I. Billings, Esq., said that he was not speaking on behalf of a client, though he has had discussions with several potential legislative candidates regarding these issues being addressed by the proposed rules. He said he believed that if any reductions are to be made, the initial distributions should be reduced. He said one of the strengths of the MCEA program is how the matching funds process works and changing that process would make the program much less attractive to potential candidates. He said spreading the shortfall across all the candidates would lessen the overall impact of the reduction per candidate. Because there are far fewer candidates that receive matching funds, if matching funds were reduced, the impact could be very substantial on individual candidates. Mr. Billings said he had initially thought that the initial distribution to gubernatorial candidates should be reduced but after giving it more consideration, he agrees with the policy reasons for reducing the matching funds for gubernatorial candidates. It is likely that all MCEA gubernatorial candidates in the general election will receive the maximum matching funds, so the impact would be the same for each candidate. He said the staff's projections for the number of gubernatorial candidates in the general election are sound and realistic. He said that it was very unlikely that more than three MCEA gubernatorial candidates would be in the general election.

Mr. McKee closed the public hearing and said the rulemaking process will continue at the January meeting.

2010 Election Year

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# DISPOSITION OF SURPLUS CAMPAIGN FUNDS

21-A M.R.S.A. Section 1017(8)

**Disposition of surplus.** A treasurer of a candidate registered under section 1013-A or qualified under sections 335 and 336 or sections 354 and 355 must dispose of a surplus exceeding $100 within 4 years of the election for which the contributions were received by:

A. Returning contributions to the candidate's or candidate's authorized political committee's contributors, as long as no contributor receives more than the amount contributed;

B. A gift to a qualified political party within the State, including any county or municipal subdivision of such a party;

C. An unrestricted gift to the State. A candidate for municipal office may dispose of a surplus by making a restricted or unrestricted gift to the municipality;

D. Carrying forward the surplus balance to a political committee established to promote the same candidate for a subsequent election;

D-1. Carrying forward the surplus balance for use by the candidate for a subsequent election;

E. Transferring the surplus balance to one or more other candidates registered under section 1013-A or qualified under sections 335 and 336 or sections 354 and 355, or to political committees established to promote the election of those candidates, provided that the amount transferred does not exceed the contribution limits established by section 1015;

F. Repaying any loans or retiring any other debts incurred to defray campaign expenses of the candidate;

G. Paying for any expense incurred in the proper performance of the office to which the candidate is elected, as long as each expenditure is itemized on expenditure reports; and

H. A gift to a charitable or educational organization that is not prohibited, for tax reasons, from receiving such a gift.

The choice must be made by the candidate for whose benefit the contributions were made.

Amendments accepted for public comment on 9/8/09 (included for comparison purposes, if necessary)

**Chapter 3, Section 4(4). ~~Distributions Not to Exceed Amount in Fund~~ Authorizing Contributions due to Shortfall in the Fund.**

A. **Authorization by Commission to accept contributions.** If the Commission determines that the revenues in the Fund ~~are~~ may be insufficient to ~~meet distributions~~ make payments under ~~this chapter~~ section 1125 of the Act, the Commission ~~will~~ may reduce payments of public campaign funds to certified candidates and permit ~~certified candidates~~ them to accept and spend contributions in accordance with the Act [§1125(13)].

B. **Limitations on permitted contributions.** If permitted to accept contributions, a certified candidate may not accept a contribution in cash or in-kind from any contributor, including the candidate and the candidate's spouse or domestic partner, that exceeds $750 per election for gubernatorial candidates and $350 per election for State Senate and State House candidates. A candidate may not solicit or receive any funds in the form of a loan with a promise or expectation that the funds will be repaid to the contributor. If a contributor made a seed money contribution to a candidate, the amount of the seed money contribution shall count toward the contribution limit for the primary election. For a replacement candidate or candidate in a special election, a seed money contribution shall count toward the contribution limit for the election in which the candidate is running.

C. **Apportioning reductions in public funds payments.** When the Commission has determined the amount of the projected shortfall, it shall identify which payments of public campaign funds will be reduced due to the shortfall and the amounts of the reductions. If the initial payments for the general election will be reduced, the Commission shall reduce proportionally those payments to all certified candidates, unless convincing policy reasons are present to reduce the payments differently.

D. **Campaign contributions to replace matching funds.** In apportioning a payment reduction to certified candidates, the Commission shall seek to avoid allowing certified candidates to fundraise in the final six weeks before a general election or a contested primary election. The Commission shall, as much as possible, reserve revenues in the Fund to pay matching funds to candidates. The Commission may permit candidates to raise contributions in advance that the candidate could spend as matching funds if authorized by the Commission. If permitted to raise such contributions, the candidate shall deposit them in a separate account with a bank or other financial institution. The candidate may spend the contributions as matching funds only if authorized by the Commission staff. The unauthorized expenditure of contributions raised to replace matching funds is a substantial violation of the Act and this rule.

E. **Written notice to candidates.** The Commission shall ~~will~~ notify participating and certified candidates in writing of any projected shortfall in the Fund and ~~will~~ specify timelines and procedures for compliance with this ~~chapter~~ subsection in the event of ~~any such~~ a shortfall.

F. **Procedures for candidates.** The candidate shall deposit any authorized contributions into the campaign account into which Maine Clean Election Act funds have been deposited, except that any contributions raised to replace matching funds permitted under paragraph D of this subsection must be deposited in a separate account. The candidate shall disclose all contributions received in regular campaign finance reports. The Commission's expenditure guidelines for Maine Clean Election Act funds apply to the spending of the contributions authorized under this subsection. After the election, the candidate may dispose of any contributions which the candidate has not spent according to the restrictions set forth in 21-A M.R.S.A. § 1017(8).

G. **Effect of fundraising on matching funds calculation.** If the Commission authorizes a certified candidate to accept campaign contributions pursuant to section 1125(13) of the Act and this subsection, the amount of the contributions that the candidate has been authorized to spend shall be treated as fund revenues received by the candidate for the purpose of calculating matching funds. Any reduction in the amount of public campaign funds paid to a certified candidate under sections 1125(8) or (10) of the Act will not affect the fundraising or spending threshold that triggers accelerated reporting by an opponent of the certified candidate under 21-A M.R.S.A. § 1017(3-B).